

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1474

B
P/s

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

- against -

3/3 Appellee,

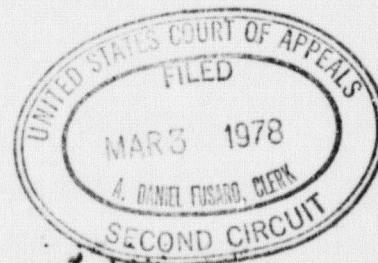
NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a
"Sha", and ERNEST GEORGE TEPPER, a/k/a "Born Freedom",

Defendants-Appellants.

DEFENDANT-APPELLANT ERNEST GEORGE TEPPER'S
BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -X

UNITED STATES OF AMERICA,

Appellee,

- against -

NORMAN STANLEY CALDWELL, a/k/a
"Alah Masha", a/k/a "Sha", and
ERNEST GEORGE TEPPER, a/k/a "Born
Freedom",

Defendant-Appellants.

- - - - -X

On Appeal from the United States
District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT,
ERNEST GEORGE TEPPER

QUESTIONS PRESENTED

1. Whether there was probable cause to arrest defendant-appellant Tepper and search his car and whether, therefore the trial court erred in denying defendant-appellant Tepper's motion to suppress.

2. Whether the trial court abused its discretion in admitting photographs on the ground that the prejudicial

effect of the photographs far outweighed their probative value.

3. Whether the trial court erred in denying defendant-appellant Tepper's motion to sever as to defendant-appellant Caldwell on the ground that Caldwell made statements inculcating defendant-appellant Tepper, and did not testify at trial.

4. Whether the trial court erred in declining to charge the jury that in order to find an attempt to rob a bank, "the substantial step or steps must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some external factors not part of defendant's original plan".

5. Whether under the Court's own charge, there was sufficient evidence to constitute an attempt to rob a bank.

6. Whether there was sufficient evidence to sustain a conviction for conspiracy to rob a bank.

PRELIMINARY STATEMENT

Defendant-appellant Tepper appeals herein from a judgment of conviction rendered on a jury's verdict of guilty of the crimes of conspiracy and attempted bank robbery. On November 14, 1977 defendant-appellant Tepper was sentenced under the Youth Corrections Act, 18 U.S.C. 5010(b) (Hon. Charles H. Tenney). Appellant is presently incarcerated pursuant to said judgment.

FACTS. BELOW

On June 30, 1977 defendant Tepper (hereinafter referred to as "TEPPER") was arrested in New York City along with two other individuals. Tepper, along with co-defendant Caldwell and another individual were subsequently indicted for conspiracy and attempted bank robbery (A-6)*. Prior to trial defendant Tepper moved to sever his co-defendants (SA-1-4)**and to suppress evidence seized from him at the time of his arrest (SA-5-15). Tepper's motion to

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*Page references designated "A-" refer to defendants-appellants joint appendix.

**Page references designated "SA-" refer to defendant-appellant Tepper's supplementary appendix.

sever was not opposed by the government (SA- 16) but it was later determined that defendants Caldwell and Tepper would be tried jointly (3-4)***.

With regard to Tepper's motion to suppress evidence, the following facts surrounding the seizure of the evidence were elicited at the suppression hearing.

Police Sergeant Stephen Peters testified that while on patrol he received two reports on his police radio of a suspicious automobile parked in the vicinity of the bank at 433 Broadway (H9-10)****. The report described the automobile, stated that the automobile was occupied by male blacks, and that it had been used in previous robberies (H-10). Sergeant Peters drove to the specified location, got out of his car and asked the driver of the automobile, who was alone at the time, for his license and registration (H-12). The driver, whom Sergeant Peters identified as defendant Tepper (H-13) handed him the papers.

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***Page references not designated by a letter refer to the trial transcript.

****Page references designated "H-" refer to the transcript of the suppression hearing.

Sergeant Peters then testified that he instructed Police Officer Hickman who was on the scene to check with the complainant who was located accross the street from where the driver had parked the car (H 14). Police Officer Hickman did so and reported that the complainant stated that other persons had been seen getting out of the automobile, putting on gloves and that one of them had concealed what appeared to be a shotgun beneath his coat (H 16).

On hearing this Sergeant Peters ordered police officers La Spina and Botros to place handcuffs on defendant Tepper and search him and underneath the front seat of the car (H 16).

On cross-examination Sergeant Peters testified that he did not attempt to verify whether or not the car had been used in prior robberies, nor did he attempt to verify the license plate number of the vehicle (H 40).

Police Officer Richard Hickman testified that while on patrol he received a report over his radio regarding a suspicious automobile occupied by three blacks

which had been possibly used in a previous bank robbery (H 91). Police Officer Hickman proceeded to the scene and, on determining the location of the complainant, talked to two persons at that location who identified the car, said that the car had been used in a previous robbery, described the clothing of the two men who had gotten out of the car, and stated that one of them was putting on plastic gloves and sticking an object under his arm (H 92-93).

On cross-examination Police Officer Hickman testified that he had not asked his central command to check the license plate number of the automobile to determine if the vehicle had been involved in other robberies (H121).

Police Officer Frank LaSpina testified that he searched the automobile and found a holster under the front seat of the vehicle (128). The search was made just after defendant was handcuffed and placed under arrest (H 129).

Police Officer William Carbone testified that while on duty he called his command office and was

informed of a suspicious car in the vicinity of the bank at 433 Broadway, occupied by three male blacks

Police Officer Carbone further testified that he had investigated a previous robbery at the same bank in April, 1977 and that the car involved was white with a blue top (H 153) (similar to defendant Tepper's automobile). He further testified that on September 9, 1977, shortly before the suppression hearing he was informed by Detective Nichols, who was also on the scene, that Detective Nichols had looked into the back seat of the car involved after defendants Bonner and Caldwell had been arrested, and found a pair of surgical gloves on the back floor of the car (H 164, 167).

Following the suppression hearing, the Court denied defendant Tepper's motion to suppress (SA 17-20).

The facts elicited at trial are set forth in defendant-appellant's, Caldwell's brief (pp.2-13). In addition, the following facts are noted:

On redirect examination of Francis Leavey, the prosecution sought to introduce six photographs into evidence, one of which was a picture of defendant Caldwell which the witness Leavey testified he had picked out on being shown the pictures by the F.B.I. (H 210, 214-216). The Court stated that the photographs appeared to be like "mug shots" (213) and admitted the photographs with a limited instruction, over counsel's objection (H 214).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING
DEFENDANT-APPELLANT TEPPER'S MOTION
TO SUPPRESS AS THERE WAS NO PROBABLE
CAUSE TO ARREST TEPPER OR SEARCH HIS
AUTOMOBILE

In this case police officers searched defendant Tepper's automobile at the scene of his arrest without obtaining a warrant to so search. It is settled law that search of a moving automobile can be made without a warrant, provided that before the search is begun, there is probable cause to believe that the instrumentality of a crime or evidence pertaining to a crime

will be found. Chambers v. Maroney, 399 U.S. 42
(1970); Dyke v. Taylor Implement Co., 391 U.S. 216
(1967).

Testimony given by police officers at defendant
Tepper's suppression hearing shows conclusively that
there was no probable cause to search Tepper's auto-
mobile. As set forth in the statement of facts above
the police officer who ordered the search testified
that he did so after hearing that the complainant stated
that persons had been seen getting out of the vehicle,
putting on gloves and one had concealed what appeared
to be a shotgun underneath his coat.

There is no indication in the record of the
suppression hearing that the complainants identified
themselves to the police officers or that any of the
complainants were known to the police as reliable
informants. The police officers' decision to arrest
defendant Tepper and search his automobile was based
on mere assertions by unidentified informants of
unknown reliability. As such, the search was not based

on probable cause and therefore the evidence seized as a result of the search should have been suppressed. Recznik v. City of Lorain, 393 U.S. 166 (1968).

The search of defendant Tepper's automobile cannot be justified as incident to a lawful arrest since (1) there was no probable cause to make the arrest (as discussed above in connection with probable cause to search) and (2) the search was not confined to defendant Tepper's person and the area within his "immediate control", as required by Chimel v. California, 395 U.S. 762, 763 (1968). At the time the search took place defendant Tepper was no longer in his car and, in fact, he had just been placed in handcuffs and was being watched by a number of police officers. Clearly the interior of his car, especially the back floor and under the seat which areas were searched and from which the evidence was seized, were not within the immediate control of defendant Tepper.

POINT II

ADMISSION INTO EVIDENCE OF PHOTOGRAPHS OF
DEFENDANT CALDWELL RESEMBLING "MUG SHOTS"
WAS HIGHLY PREJUDICIAL TO DEFENDANTS AND
CONSTITUTED AN ABUSE OF DISCRETION BY
THE TRIAL COURT

During the course of the trial a photograph of defendant Caldwell which resembled a "mug shot" was admitted into evidence over the objection of counsel. The trial court commented that the photograph resembled a "mug shot", but subsequently admitted the picture with the instruction to the jury that the photograph had been taken after Caldwell's arrest.

The standards for determining whether evidence may be excluded as prejudicial are set forth in United States v. Robinson, 560 F. 2d 507 (2nd Cir. 1977). In that case which involved a bank robbery, the defendant contended that he had been prejudiced by admission of testimony that at the time of the robbery and the arrest, defendant was in possession of a gun. Defendant further contended that such prejudice outweighed the probative value of the evidence.

The Court there held that broad discretion must be accorded the trial judge in determining whether the probative value of relevant evidence is outweighed by danger of unfair prejudice and the trial judge's exercise of discretion should be upheld unless he acts arbitrarily or irrationally (at 514-515). The Court concluded that there was no abuse of discretion since the trial court "delayed admission of the evidence until virtually all of the other proof had been introduced by which time he was in a better position to weigh the probative worth of the evidence against its prejudicial effect" (at 515). The Court also noted that the trial court

"took positive steps to minimize the potential impact of the evidence by precluding the government from introducing the gun itself...and by carefully instructing the jury that the testimony ...was introduced for a limited purpose only" (at 516).

The instant case is sharply distinguishable from United States v. Robinson, supra. Here, unlike in Robinson the trial court did not wait until most of the proof

had been introduced before deciding whether to admit the photographs, nor did the trial court choose to merely allow the witness to testify as to his identification of the picture rather than admitting the pictures themselves.

Counsel has not found any New York federal cases dealing with prejudicial admission of photographs resembling "mug shots".

Federal cases in other jurisdictions have stated that admission of "mug shots" is highly prejudicial and constitutes grounds for reversal, Eg. United States v. Rixner, 548 F. 2d 1224 (5th Cir. 1977), cert den. 431 U.S. 932.

In the instant case there is no doubt that the prejudicial effect of the photographs far outweighs their probative value. Indeed the photographs have very little probative value in that the subject of one of the pictures, Caldwell, did not try to show at trial that he was not in the bank at the time alleged. The prejudicial effect of the photo arises from the fact

that it closely resembles a mug shot as noted by the trial court. The prejudice accrues not only to the subject of the photograph, Caldwell, but also to his co-defendant Tepper since much of the proof regarding Tepper's involvement in the alleged offenses centered on the fact that he was seen with Caldwell and Bonner on the date and at the time and place alleged in the indictment. To be seen with Caldwell at the time and place of the offense, where the jury could infer from the photographs resembling "mug shots" that Caldwell had a prior criminal record, might strongly suggest to the jury that Tepper was associating with a criminal and was quite likely a participant in the conspiracy and attempted bank robbery. This prejudice to Tepper far outweighs the minimal probative value of the photograph and constitutes reversible error.

POINT III

THE TRIAL COURT ERRED IN DENYING
DEFENDANT-APPELLANT TEPPER'S MOTION
TO SEVER AS TO DEFENDANT-APPELLANT
CALDWELL

In the instant case, defendant Tepper moved to sever both co-defendants Bonner and Caldwell. The motion was granted as to defendant Bonner, but denied as to defendant Caldwell. Post-arrest statements made by Caldwell which implicated defendant Tepper were subsequently admitted at the joint trial of Caldwell and Tepper, even though Caldwell did not testify.

It is well established that a statement by one co-defendant inculcating another co-defendant is not admissible at their joint trial if the co-defendant, whose statement is sought to be introduced, does not testify, and admission of the statement would be seriously harmful to the defendant. Bruton v. United States, 391 U.S. 123, (1968). Subsequent court opinions have interpreted Bruton to require reversal only if (1) the testimony concerning the complaining co-defendant is clearly inculpatory, and (2) the testimony is

vital to the government's case. United States v. Cassino, 467 F. 2d 610, 623 (2nd Cir. 1972)

There is no doubt that the post-arrest statements made by Caldwell, which were admitted at trial meet this two-part test. The statement which indicates that the two co-defendants and the third participant, Ivan Bonner, met on the morning of the offense and drove to downtown Manhattan, is clearly inculpatory of defendant Tepper in that it forms a major basis on which the jury could conclude that on the day in question defendant Tepper met with Caldwell and Bonner and drove them downtown, thereby implying his participation in the formation and carrying out of the conspiracy.

The statement by Caldwell was vital to the prosecution's case against defendant Tepper. Aside from testimony that defendant Tepper had stated under questioning that he had met with the other persons involved and driven them downtown, and proof at trial that defendant Tepper was at the scene of the crime at the date and time alleged in the indictment, there was no strong evidence showing that defendant Tepper

had actually participated in the conspiracy and attempt to rob the bank. Testimony regarding Tepper's post-arrest statements was weak as the individual who testified was shown on cross-examination to be unable to remember an important part of Tepper's post-arrest statement. The admission of Caldwell's statement strongly corroborates in the jurors' minds the testimony regarding Tepper's post-arrest statements and therefore was vital to the government's case against defendant Tepper. On this basis defendant Tepper's motion to sever as to Caldwell should have been granted.

POINT IV

THE TRIAL COURT ERRED IN NOT CHARGING THE JURY IN ACCORDANCE WITH APPELLANTS' REQUESTS

Rather than burden this Court with a repetition of this point as set forth in co-appellant Caldwell's brief, this Court is respectfully referred to co-appellant Caldwell's brief, pp. 14-17.

POINT V

THE TRIAL COURT ERRED IN SUBMITTING THE
ATTEMPTED ROBBERY COUNT TO THE JURY AND
IN DENYING APPELLANT'S MOTION TO SET
ASIDE THAT VERDICT.

Rather than burden this Court with a repetition
of this point as set forth in co-appellant Caldwell's
brief, this Court is respectfully referred to co-
appellant Caldwell's brief, pp.18-19.

POINT VI

THERE WAS INSUFFICIENT EVIDENCE TO
SUSTAIN A CONVICTION FOR CONSPIRACY

Rather than burden this Court with a repetition
of this point as set forth in co-appellant Caldwell's
brief, this Court is respectfully referred to co-
appellant Caldwell's brief, pp. 19-20.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE
JUDGMENT APPEALED FROM MUST BE REVERSED,
AND THE INDICTMENT DISMISSED.

Respectfully submitted,

DUDLEY GAFFIN
Attorney for Defendant-
Appellant, ERNEST TEPPER

2 *ies*
COPY RECEIVED
MAR 3 - 1976
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